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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

No. 339.

SOUTHERN UTILITIES COMPANY, PETITIONER,

against

CITY OF PALATKA (FLORIDA).

REPLY BRIEF FOR PETITIONER.

W. B. CRAWFORD,

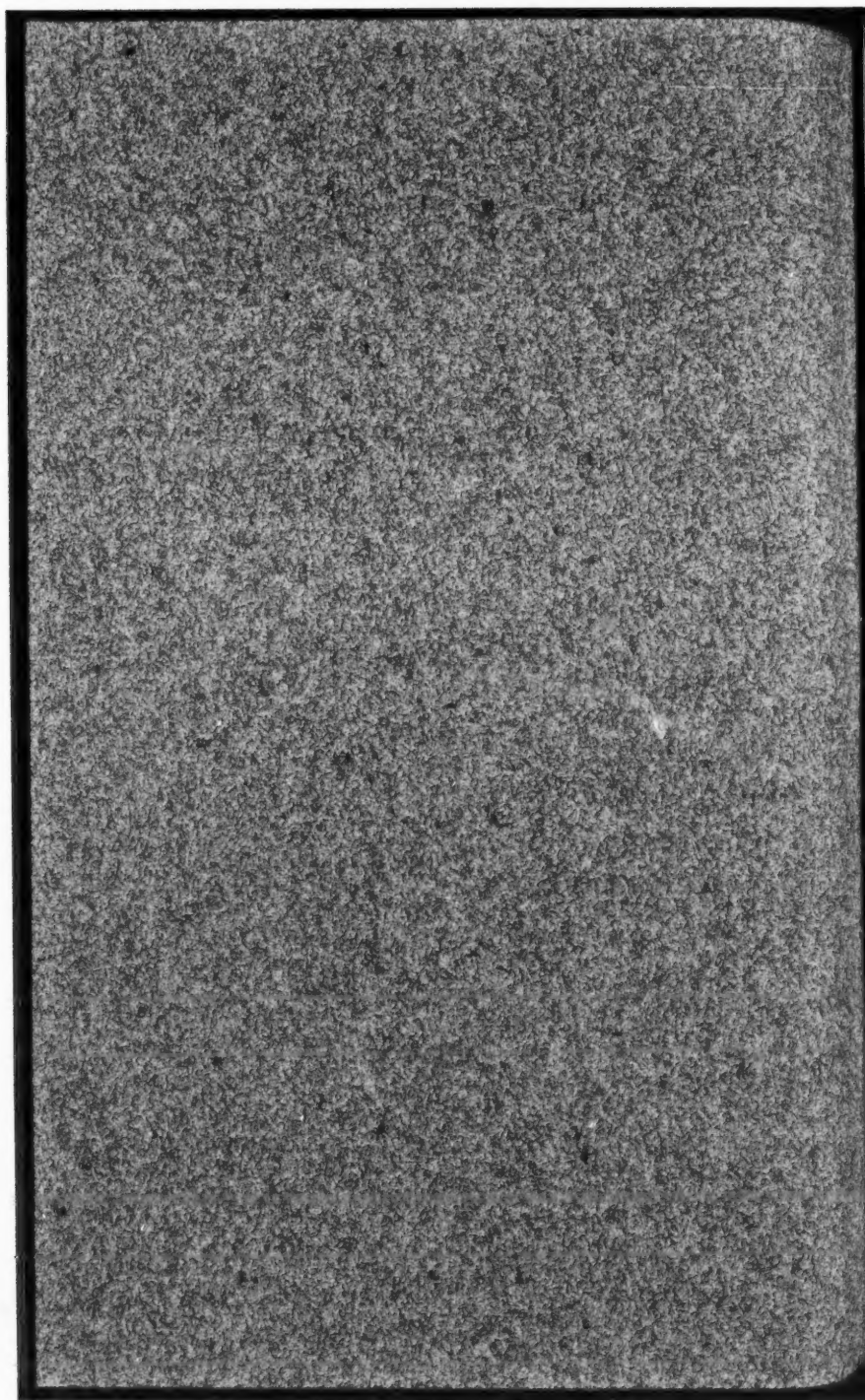
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The respondent's brief cites familiar decisions and amplifies well-known principles of law, but seems to us to fail to demonstrate their applicability to the particular state of facts here presented, under the Constitution and laws of the State of Florida, as interpreted by the Supreme Court of that State.

This cause is here on writ of certiorari to the Supreme Court of the State of Florida. The opinion of the State Court is reported in 90 Southern Reports, at page 326. The petition for certiorari was granted by this Court, upon the application of the Southern Utilities Company, on April 21, 1924. In the State Court, the municipality was the plaintiff. The judgment of the State Court, refusing to inquire into the reasonableness of the electric rate which the company was charging and compelling the company to return to a rate alleged to be confiscatory, was entered upon the overruling of a plea of the defendant company as insufficient (Record, page 20). The facts set out in that plea (Record, pages 24 and 25) are therefore to be deemed true, for the purposes of this review.

No case is cited in which this Court, or any other Federal Court, has upheld a non-compensatory rate under circumstances which seem to us to correspond to those here under review. Upon the facts here presented, the question seems at least an open one in this Court—uncontrolled by any decision cited by the respondent—although it does seem to us to fall exactly within the illustration and the rule declared by Chief Justice White in the *San Antonio* case (255 U. S. at page 556).

The Decision of the Federal Court as to the Power of the City of Palatka to Contract as to Rates.

The respondent's brief fails to mention that, as between this municipality and this petitioning public utility, in respect of the rates charged for gas in Palatka, the United States District Court for the Southern District of Florida decided that this company was and is in nowise bound by the rate provisions of this company's *gas* franchise, because the Constitution and laws of the State of Florida do not permit elements of mutuality and enforceability to attach, for any definite period, to *rate* provisions in a franchise "contract" granted by the City of Palatka.

The rate contained in this company's gas franchise having become grossly inadequate, in 1921, the company promulgated and put in force a higher rate. It asked a preliminary injunction to restrain the municipality from trying to enforce the confiscatory rate.

This injunction was granted *pendente lite*, on the ground that the company was not bound or limited by alleged contractual terms which did not, and could not under the Florida Constitution, bind and limit equally the legislative

agency. The company was accordingly permitted to put and keep in effect the higher rate which it had announced.

That ruling of the United States District Court, adverse to the power of the City of Palatka to insert in its franchises any binding provisions limiting rates, was filed in 1921 (*Southern Utilities Co. v. City of Palatka*, not reported; see copy of opinion of Call, D. J., annexed to petition for certiorari in this case), and that higher rate for *gas* has ever since been charged and collected in Palatka, under that decision of the United States District Court.

The State Court having taken a contrary view, upon identic facts, as to franchise provisions fixing future *electric* rates in Palatka, the question is here for decision; and the future of *both* gas and electric rates and service in Palatka will depend upon the outcome here, although the municipality has not brought the Federal determination here for direct review.

The Facts Which Distinguish this Case from Those Relled on by the Respondent.

Because the question here is, in first instance, whether the facts of this case bring it within the authority of the cases cited by the respondent and by the State Court, we wish to outline very definitely the several facts which seem to us to make this a case of first impression in this Court. For completeness, we will refer, first, to certain of the basic and procedural aspects.

1. THE PLEA OVERRULED AS INSUFFICIENT.

The determination and judgment of the State Court, denying to the Southern Utilities Company the right to charge

the rate it had promulgated and compelling it to return to the pre-war rate, was not based upon any hearing of testimony or inquiry as to the *facts* concerning the issue, tendered by the plea, that the ten-cent rate had become unreasonable and confiscatory and that the thirteen-cent rate, established by the company, was required for adequacy. To the city's complaint that the company should be compelled to return to the 1914 rate, the company filed a plea, under the Florida State practice, and that plea alleged various facts (Record, pages 24 and 25). The municipality thought these facts insufficient to bar its claim for the compulsory restoration of the pre-war rate and brought the case on for final hearing *on the plea* (Record, page 26).

After argument, the State Court overruled the plea as insufficient and entered final judgment on that ground (Record, page 26). The facts alleged in that plea are therefore to be taken as true for the purpose of here determining whether the State Court infringed the constitutional rights of this company, as was duly set out in such plea (Record, page 25).

Substance of the Company's Plea.

The plea set out, in substance, the following facts, among others:

(1) That the rate of ten cents per kilowatt for electric service in Palatka is unreasonably low;

(2) That although the ten-cent rate was reasonable in 1914, "the great change in economic conditions brought about by the World War have rendered it impossible" and confiscatory, contrary to the provisions of the Constitution of the United States (Record, page 25);

(3) That any rate of less than thirteen cents would deny the company a return on its property, and would be "unreasonably low" and confiscatory of its property, whereas a rate of thirteen cents would be a reasonable rate; and

(4) As a legal conclusion, that the said franchise ordinance, in so far as it purports to prescribe said rate of ten cents per kilowatt, meter measurement, is in conflict with Section 30 of Article XVI of the Constitution of the State of Florida *and is void and of no effect*" (Record, page 25).

The State Court overruled this plea "as insufficient," and by injunction compelled the company to stop charging thirteen cents and to go back to the pre-war rate of ten cents (Record, pages 26 and 27).

That in view of the failure of the franchise to bind *both* parties to the contract—the public and the company—the Court should have proceeded to inquire as to the reasonableness of the thirteen-cent rate promulgated and charged by the company, see the decision of the Circuit Court of Appeals for the Eighth Circuit, in *Nebraska Gas and Electric Company v. City of Stromsburg*, decided November 21, 1924, not yet officially reported (26 Rate Research 103).

2. CIRCUMSTANCES OF THE ESTABLISHMENT OF THE RATE ENJOINED BY THE STATE COURT.

In this connection, it should perhaps be mentioned that when operating costs began to advance, soon after the outbreak of the World War, the company and the city made some kind of a temporary arrangement or agreement (of which no copy is in this record), whereby the right of the company to charge thirteen cents instead of ten cents was

recognized by the city down to January 1, 1922 (Record, page 17). When this expiration date arrived, the city demanded that electric rates be restored to the pre-war level.

The company was, however, confronted by the fact that its outlays for wages and materials had not returned to anything like pre-war levels. The United States District Court for the Southern District of Florida had held, the year before, in a suit brought by this company, that rate limitations contained in a gas franchise granted by the City of Palatka were not binding upon either the governmental agency or the company, and so did not prevent this company from promulgating and charging higher rates, if required for reasonableness and adequacy.

This ruling seemed equally applicable to the petitioner's electric rates; and so the company continued to charge the thirteen-cent rate, which it had promulgated and charged for several years, with the formal consent of the City of Palatka. This was continued until the State Court restrained it, in July of 1922 (Record, page 11).

3. NO EMPOWERING OF A STATE COMMISSION TO GRANT RELIEF FROM THIS CONFISCATORY RATE.

Unlike nearly all of the States, Florida has not created a commission with power to fix just and reasonable electric (or gas) rates—neither too high nor too low—notwithstanding any limitations undertaken to be prescribed by municipal ordinances. No machinery has been set up for the filing and publishing electric (or gas) rates.

In Florida, electric rates remain subject to common-law requirements of reasonableness and adequacy. The electric company may in first instance promulgate and put in force

such rates as it deems reasonable. The Legislature may at any time act to prevent excessive charges, and may act directly or through a municipality or commission. In the absence of such legislative action, determination of the reasonableness of rates promulgated by an electric company rests, as at common law, in the courts.

Leaving out of consideration for the moment the question whether Florida municipalities may regulate such rates or limit them by franchise, the right to initiate, fix, charge and collect reasonable and adequate electric rates is, of course, vested in the utility itself, subject to the powers of the courts to restrain, or to refuse collection, of excessive or discriminatory rates.

When the City of Palatka refused to permit this company to continue charging the thirteen-cent rate which the new price levels had compelled, there was no State forum to which the company could repair, secure a hearing, present *its facts*, and compel regulatory relief.

If, as the Federal Court had held, rate limitations in Palatka franchises lacked mutuality and bound no one, the course open to the company was to exercise its common-law right to fix and collect such rates as it deemed necessary for adequacy, subject to judicial review if the company exercised capriciously this common-law right of rate determination and promulgation; and *this was exactly what the company did* and was exactly what the State Court restrained it from doing, the ground of such restraining being that the franchise provision forbade and stood in the way, and would continue to forbid and stand in the way, of compensatory rates, unless and until the Legislature itself, or some regulatory agency created and empowered by it, should determine

that this company need not continue to charge rates so low as to confiscate its property.

4. THE FRANCHISE AND ITS RATE PROVISIONS.

The franchise ordinance and the company's acceptance thereof are printed in full at pages 5 to 10, inclusive, of the records (Exhibits "A" and "B" to complaint). The plea overruled by the State Court referred to this ordinance and alleged the copy thereof to be true and correct (Record, page 24).

The rate provisions of this 1914 ordinance are not recited as conditions of, or as consideration for, the grant. Other provisions, which were intended to be made conditions of the grant, are so described (Section 121; Record, page 7).

The term of the grant was thirty years (Section 1; Record, page 5). The franchise grant was not exclusive (Section 17; Record, page 8). Section 14 of the ordinance gives the city a remedy by forfeiture for "a substantial failure on the part of the grantees herein to comply with the terms and provisions of this ordinance."

5. PROVISIONS AND STATE INTERPRETATION OF THE FLORIDA STATUTES AS TO MUNICIPAL CONTROL OVER ELECTRIC RATES.

No provision of the Palatka charter or of any statute of the State of Florida contains any specific provision or reference indicative of an intent to empower the City of Palatka to insert in its franchise ordinances or contracts any limitation on the rates chargeable by the company to its general patrons (other than the municipality), for a thirty-year period or any specific period.

The Supreme Court of Florida has, however, held that, in the absence of any specific constitutional or statutory provision to the contrary, the power to insert rate limitations in a franchise ordinance is a part of the inherent and implied governmental power of the municipality, in the interest of its inhabitants, and that power to include rate schedules in municipal ordinances is to be deemed inferable from the *general* grants of power made by the Legislature to the City of Palatka.

In this Court, the foregoing is of course to be accepted as a pertinent part of the interpretation which the highest Court of the State has placed upon its Constitution and laws.

As to the *nature* of such derived power of the municipality to insert rate provisions in franchise ordinances, we cannot assert that the opinion of the Florida Supreme Court is clear beyond peradventure. It would seem, however, that significance must fairly be attached to the following excerpts from the opinion under review (Record, pages 41 and 42).

"Erecting or establishing or procuring and operating a public utility plant may be a corporate or business function, while *contracting*, in connection with a franchise grant to a public service corporation, for service of a public nature to its inhabitants, may be a *governmental power of a municipality*" (Record, page 42).

"Ordinance contracts for supplying the city and its inhabitants with lights, is a usual and necessary function of a municipality, and authority to make such contracts may be included in powers given in general terms, where such power is not in conflict with specific powers conferred. See *State ex rel. Ellis vs. Tampa Water Works*, 56 Fla. 858; 47 Southern Rep. 358" (Record, page 41).

"The above-quoted general statutory powers of the city are sufficient to confer upon the city authority to make a franchise contract with provisions as to rates to be charged individuals for electric lights of the character of the one in controversy; such contract is consistent with the express power 'to provide for the lighting of streets of the city,' and is not repugnant to or inconsistent with any specific or general statutory power of the city" (Record, pages 41-42).

"Authority to make the contract for rates in this case is afforded by the general provisions conferred upon the city. Such authority is not inconsistent with special powers given the city, and is not in derogation of any State law or rule of public policy in this State" (Record, page 42).

6. THE FLORIDA CONSTITUTION AND THE STATE INTERPRETATION OF ITS PERTINENT RESERVATION.

We come now to the aspects which seem to us to distinguish this case from all of those relied on by the Florida Supreme Court and cited by the respondent, and to align this case rather with the rulings in the Iowa, Texas, Louisiana, Colorado and Nebraska cases, if, indeed, the legal principles determinative of the instant state of facts have anywhere been specifically applied to them.

The Florida Constitution provided, at the time the 1914 ordinance was passed by the Palatka City Council, and still provides (Section 30, Article XVI; Record, page 35):

"The Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other

services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures." (Italics ours.)

The furnishing of electric service falls within the category of "other services of a public nature." The Florida Legislature is therefore to be deemed invested, by Section 30, with full power to "prevent unjust discrimination and *excessive charges*" for electric service.

The effects of this section of the organic law of the State of Florida were construed by the Supreme Court of the State in *City of Tampa vs. Tampa Water Works* (45 Fla. 600; 34 Southern Rep. 631; Record, pages 35 and 36), on the authority of which decision the present case was decided by the Florida Supreme Court.

As to this power to prevent "unjust discrimination and *excessive charges*," the State Court has held, in substance (italics ours):

"1. That the power mentioned in this section is full power; a continuing, ever-present power. Being irrevocably vested by this section, the Legislature can not divest itself of it. *Neither can it bind itself by contract, nor authorize a municipality—one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever in its judgment the public exigencies demand its exercise. Full power cannot exist, if by contract that power can be curtailed or impaired.*" (Record, page 36.)

"2. That without this section this power to regulate rates would exist under the general grant of legislative power in Section 1, Article III, but such power could be surrendered by a contract made by the State or by a municipality by its authority. With

this section in force, the power to surrender by contract the right to regulate rates is taken away, for the authority to surrender cannot co-exist with the ever-present, continuing power to regulate, which is declared by this section to exist in the Legislature." (Record, page 36.)

"3. That every charter granted and every contract made by the Legislature, or by a municipality under its authority, are accepted and made subject to and in contemplation of the possibility of the subsequent exercise of the power to prevent *excessive charges*, which by this section is unalterably and irrevocably vested in the Legislature. *The section not only becomes a part of every such contract, as much so as if written therein, but by implication it denies the authority of the Legislature to bind itself either by a contract of its own making, or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary to do so.*" (45 Fla. 600; Record, page 36.)

As construed by the highest Court of Florida, therefore, the provisions of Section 30 of Article XVI, empowering the Legislature, directly or through an authorized agent (*e. g.*, a municipality or commission), *to prevent excessive charges and reduce electric rates*, is as much a part of every franchise contract "as if written therein." This provision for a *reduction* in the franchise rates, at the will of the Legislature or its authorized agent, is held to be an integral part of the franchise at bar.

The highest Court of Florida has held, in this and numerous other cases, that a utility company can *increase* its rates above franchise figures only if it obtains the *consent*

of the opposite party to the "contract," *e. g.*, the municipality or the Commission (where the Legislature has delegated rate-revising powers to a commission).

On the other hand, the State Court has held that franchise rates may be *reduced*, over the objection of the utility company, by the "other party" to the contract—the Legislature, acting directly or through the municipality or a commission.

In the Tampa case just quoted, the State Court interpreted Section 30 to mean not only that a rate fixed in a franchise contract may be REDUCED over the objection of the utility company, but that such compulsory reduction of the franchise rates may even be made by the municipality itself, even where the Legislature has subsequently vested the municipality with power to regulate rates.

City of Tampa vs. Tampa Water Works, supra.

When the State Court refused to give the water company an injunction against the municipal reduction below the contract rate, the case was carried by the company to this Court, which adhered to the interpretation which the State Court had placed upon Section 30, Article XVI, of the State Constitution, and so refused to treat the contract rates as enforceable in behalf of the company, no claim being made that the lowered water rates would enforce confiscation.

Tampæ Water Works vs. Tampa, 199 U. S. 241.

If the State Court holds that, because of the presence of Section 30 as virtually a literal part of every franchise agreement in Florida, the Legislature directly or through an authorized agent (*e. g.*, the municipality) may at any time *reduce, over*

the company's objection, a rate fixed in a franchise grant, notwithstanding the franchise term, may the franchise rates be insisted upon by the city as limiting and preventing the company from exercising its common-law right to advance its rates, if need be, to escape confiscation and secure adequacy of return?

If, as we have seen, in the State of Florida, no franchise contract, made by the Legislature or any of its agents, can constitutionally authorize or fix a rate which may not immediately or at any time be reduced through the exercise of this one-sided reservation of right to *reduce* rates at any time the public interest seems to require it, and to do so through the Legislature or any delegated creature of the Legislature, how is the Florida situation to be distinguished, *in legal effect*, from that obtaining in Iowa, Colorado, Nebraska, Texas, Louisiana, and other States where the provisions of the State Constitutions are deemed to deprive franchise contracts of mutuality and enforceability as to rates.

In none of the cases cited by the respondent do we find a decisive answer to these interesting questions of mutuality and fair play. Nowhere is it demonstrated in the respondent's brief that the decisions of this Court in the *San Antonio* case (255 U. S. 547), the *Ortega Company* case (260 U. S. 103), the *Chariton* case (255 U. S. 539), the *St. Cloud* case (265 U. S. 352), and of the Circuit Court of Appeals for the Fifth Circuit, in which Florida is situated (*City of New Orleans vs. O'Keefe*, 280 Fed. 92), and of the Circuit Court of Appeals for Eighth Circuit in *Nebraska Gas and Electric Company vs. City of Stromsberg* (not yet officially reported), are not, *in principle and legal effect*, fully applicable here.

I.

The Two Tests Laid Down by this Court in the Chariton Case.

The respondent's brief agrees (page 1) that this case is controlled by the decision of this Court in the *Chariton* case (255 U. S. 539), but proceeds fundamentally on the theory that this case falls within the *second* of the two "indisputable propositions" declared in the *Chariton* case:

"(a) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;

"(b) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

Power to fix by contract means power to fix by valid, mutual contracts; the Palatka franchises do not and cannot "fix by contracts rates to govern during a particular time."

The United States District Court so held, as to the gas franchise, for reasons equally applicable to the thirty-year electric

franchise here at bar. If this ruling was correct, the State Court was wrong in compelling the company to abandon its reasonable and lawful rate and return to a rate which had become confiscatory.

That the State Court held that the City of Palatka had power to put a rate schedule in a franchise which, in behalf of the State, the city granted for a term of thirty years, may be deemed controlling on this Court; but that fact does not make such a document a *contractual fixation of rates to govern for that thirty-year period*.

The State Court has also held that, under the Florida Constitution, the Legislature has not empowered, and cannot empower, any of its creatures to do what the Legislature could not itself do, viz., to make contracts fixing *rates which shall remain in force "for a particular time" unless both the Legislature (or its agent) and the company consent meanwhile to a change in such rates*.

On the contrary, the State Court has held that an integral part of every franchise "contract" in Florida is a provision that such rates may at any time be *reduced*, during the franchise period, over the company's objections.

The State Court has also held that as to any rates inserted in a franchise contract by a municipality, the Legislature may, at any time during the franchise period, *reduce* such franchise rates, over the company's objections, and that such involuntary reduction may be compelled by the Legislature directly or through any of its authorized agents, at the will of either, even by the municipality which put such rates into its franchise grant.

These interpretations of the State Constitution and statutes, by the State Court, are also controlling upon this Court; and

if their effect is to destroy mutuality and definiteness of period, as to rate provisions in a franchise, and if such franchise provisions are nevertheless used by the State Court to compel the utility to continue those rates against its will, although they have become confiscatory, whereas the utility could not compel the State to continue them against the will of the Legislature, if such rates had become excessive, *it seems clear to us that there is no fixation by contract of rates to govern for a definite period, within the meaning of the second proposition declared by this Court in the Chariton case.*

The Chariton Case.

The respondent's brief (page 1) deems this case controlled by the *Chariton* case (255 U. S. 539). In the *Chariton* case, as here, the State Court had construed the Iowa Constitution and laws to mean that the regulatory power could be asserted to reduce a franchise rate at any time. This had not been done, as to the franchise in question, but the right to regulate and reduce existed and could be asserted and exercised at any time.

These facts were deemed by this Court to prevent Iowa municipalities from making rate contracts enforceable, at the instance of the utility, for any definite period of years. This Court therefore held that such Iowa franchises lacked mutuality, were void, and could not be enforced *against* the utility, to prevent reasonable rates.

The San Antonio Case.

On the same day as the decision in the *Chariton* case, a decision was filed also in the *San Antonio* case (255 U. S.

547). Both opinions were written by Chief Justice White; both held rate provisions of franchise grants to lack mutuality and so to be unenforceable against the company.

In the *San Antonio* case, Chief Justice White said, illustratively but most pertinently:

“Where the right to contract exists, and *the parties, the public on one hand and the private on the other*, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. *Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract*, it would follow that that power would have to be exerted *and hence the supposed condition operating on the private owner would be nugatory.*”

That rule and illustration seems precisely in point here. The two parties to a franchise are the public and the private company. Florida Court has held that a franchise contract in that State necessarily leaves “the regulating power wholly uncontrolled.” The constitutional prohibition against any abridgment or suspension of the regulatory power is deemed incorporated into every franchise. There cannot be an iota of suspension or limitation of the regulatory power, by any franchise contract. The right and power to reduce is plenary.

Under such circumstances, Chief Justice White said that “the supposed condition on the private owner would be nugatory.”

If the supposed rate provision is “*nugatory*,” then the petitioner had the right to increase its rates to avoid confiscation.

The City of St. Cloud Case.

The respondent seems to rely chiefly upon the *Opelika Sewer Company* case, from Alabama, decided by this Court in May of last year. The respondent's brief makes no effort to distinguish the decision in the *City of St. Cloud* case, decided by this Court on the same day. Under the Minnesota Constitution and laws, the city of St. Cloud had been given power to fix rates by contract for a fixed term and also the power to regulate rates. Evidently realizing that if *both* these powers were possessed *contemporaneously*, any rate contracts would be void for lack of mutuality, this Court held that these were alternative and mutually exclusive provisions; the city could act by *either* method, but not by both.

If the municipality made a rate contract, it could not, during its term, change the rates without the utility's consent; nor could the Legislature itself make such a change during such period. Even the legislative power was, under the *Los Angeles* case, deemed suspended by the city's authorized contract.

On such a construction of the State laws and the franchise contract, the latter was deemed to have mutuality and validity.

Yet, in Florida, the State Court has held that the city's contract does not and cannot suspend the regulatory power in any respect whatever; that the Legislature may reduce the rate at any time; that the Legislature may even subsequently empower the city to reduce the rate at any time; that the city may reduce the rates, and that the company cannot complain or resist if the city does so reduce the franchise rates within the franchise period.

The difference between the *St. Cloud* decision and the Florida interpretation may be made clearer by noting this fact: In the *St. Cloud* opinion, reference is made to a provision of the Minnesota laws conferring regulatory powers on municipalities. This provision was that such enactment should not affect or impair the validity of any existing contract with a public utility. This was deemed to emphasize that the franchise contract suspended the regulatory power and so possessed mutuality.

In the *Tampa* case (*supra*), in Florida, the Municipal Empowering Act contained an identic provision against impairing existing contracts. Nevertheless the Florida Court held that the city might reduce the franchise rate, over the utility's objections. This was because the provisions of Section 30, as to preventing *excessive* charges, were as if physically incorporated in the franchise contract.

The Opelika Sewer Case.

This decision is, perhaps with some reason, relied on by the respondent. The precise questions here presented and litigated do not seem to us to have been raised and decided in that case. Therefore the *Opelika* decision should not be deemed precedent here. In any event, the *Opelika* decision must be read and considered in connection with the contemporaneous *St. Cloud* decision, above reviewed.

In the *Opelika* case, there was considerable uncertainty in this court whether the Alabama statutes really contemplated that the disposition of sewage and the ownership of sewage facilities were to be turned over to a private corporation, by contract. The State Court held this view, however, and this Court adopted it, subject to the proviso of the

State Constitution that the legislature might "revoke" such a contract.

The State Court further held that the municipality had been specifically given the power to *regulate* sewer rates. This grant ante-dated the contract in suit.

The Alabama Court held that under its Constitution and laws, that, despite this power of municipal regulation *in the absence of contract*, "*the city of its own motion may not recede*" from a rate contract, once entered into. The language quoted is that of this Court, in adopting the State view.

In *Bessemer v. Bessemer City Water Works* (152 Ala., 391), cited by this Court (page 219) as the State decision that "a city even though having the power to regulate rates could find itself by contract," it was held that a franchise contract wholly suspended the regulatory power during the franchise term and created "a vested right" in favor of the company. Such a construction of the State law could of course import mutuality to a franchise grant.

That, however, is not the Florida construction of its constitution and laws. The Supreme Court of Florida has held, and this Court has held, that a Florida municipality possessing the regulatory power, even granted *after* the rate contract, may "of its own motion recede" from a rate contract such as that at bar (199 U. S. 241).

The Recent Decision of the Circuit Court of Appeals for the Eighth Circuit.

In *Nebraska Gas and Electric Company vs. City of Stromsburg*, decided on November 21, 1924, and not yet officially reported (26 Rate Research 103), the franchise was for a twenty-year period and the company had been permitted to

exceed the franchise rates during 1920 and 1921. The city brought suit to compel the company to return to the franchise rates. The company interposed a plea similar to that here at bar.

The Circuit Court of Appeals for the Eighth Circuit, six months after the decision in the *Opelika* and *St. Cloud* cases, held that the rate provisions of the franchise contract lacked mutuality and were void and unenforceable, and remanded the case to the trial court to hear and determine the question of what rates were in fact required, to avoid confiscation.

This decision as to lack of mutuality was based on the provision of the franchise ordinance, which undertook to give the city a right to have the rate *revised downward*, at the end of the second, fifth, tenth and fifteenth years, but gave no corresponding right to the company.

We refer to the careful opinion of the Circuit Court of Appeals. On its facts, the *Stronburg* case is closely similar to the present case, except that here the provision read into the franchise authorizes a preventing of *excessive* charges at *any* time.

The Saratoga Springs Case, in New York.

As further bearing upon the validity of a reservation of right to *reduce* rates, with no right to increase them for cause, we may refer to the fact that in *Village of Saratoga Springs vs. Saratoga Gas and Electric Co.* (191 N. Y. 123), the New York Court of Appeals had before it the rate-fixing provisions of the Public Service Commission's law as first enacted, in 1907. That statute empowered the Commission to fix rates for a period prescribed in the order, not exceeding three years.

If the company accepted such rates and put them into force, the company was bound by them for such period and thereafter until the Commission changed them; *the company* could not increase them or file complaint with the Commission to increase them. On the other hand, the Commission might reduce such rates if the facts were found to warrant it.

The Court of Appeals held that such a provision lacked mutuality; that it purported to bind the company to continue specified rates but not the State, and that the provision accordingly denied to the company the equal protection of the laws and rendered invalid any rate fixation pursuant to it.

Respondent's Own Brief Negatives the Idea of Mutuality of Obligation and Definiteness of Period.

The respondent's position is frankly that these franchise rates are contractually binding upon the company for thirty years, but are contractually binding upon the Legislature and city only until the Legislature changes them or authorizes some one else to change and reduce them, in which event the contract obligation automatically ceases.

"The respondent's contention, and the decision of the Supreme Court of Florida in this case," is that rates contained in a franchise are "valid and binding contractual obligations" (as against the company) "*so long as* the Legislature does not exercise its power" under Section 30 of Article XVI of the State Constitution (Respondent's Brief, page 2). This the Legislature may do at any time, whereupon the franchise rates admittedly cease to be "valid and binding contractual obligations."

"*Until* the Legislature does pass such laws * * * the contract is a valid and binding obligation" (Respondent's Brief, page 7).

In other words, the respondent's position is that franchise rates continue only at the will of one of the parties; the State or its creature can prevent the company from increasing them, but the company could not prevent the Legislature or its authorized creature from reducing them.

That the Legislature has not yet abrogated the rates in this franchise does not give mutuality and definiteness of period to these franchise rates.

One of the fundamental misapprehensions indulged in by the respondent's counsel and by the State Court is that a purported contract possesses mutual enforceability up to the moment that the party now seeking to enforce it tries instead to repudiate and change it.

Mutuality and definiteness of period do not, we submit, arise in any such way. These franchise rates do not derive definiteness of period or mutual enforceability from the fact that the party which would be interested in *reducing* these rates has *not yet* tried to do so itself and has *not yet* authorized any of its agents to undertake such a disregard of the franchise rate. The lack of mutuality arises, as held in the *Chariton* and *Stromsburg* cases, from the fact that such a one-sided provision for change in the contract rates, is contained or read into the contract itself.

The *test* is whether one of the two parties *could, at will*, undertake such a flouting of the franchise rates, *within the contract period*, against the remonstrance and to the ruin of the opposite party. The State Court has held, and this Court has held, that one of the two parties to these Florida franchises could reduce these rates, at any time, regardless of the other party's objections.

Tampa Water Works vs. Tampa, supra.

As pointed out by Chief Justice White in the *San Antonio* case, already quoted, every "contract" in respect of public utility rates has two parties: (1) The *public*, acting through the Legislature or through an authorized agency (*e. g.*, a municipality), and (2) the public utility company.

The Legislature and the municipality *are not two different and separate parties*. They are one and the same party—principal and agent. In a controversy with the opposite party, the Legislature and its creatures have no rights *inter se*.

If the contract lacks mutuality and definiteness of period as against the principal, it lacks those same qualities as against the agent and is not enforceable by the agent.

If the city has, or may be given by its principal, power to reduce rates inserted in franchises, and to do this within the franchise term, and over the company's remonstrance, the fact that the agent has not yet done this or has not yet been delegated by its principal to do this, remains immaterial.

If the agent or the principal may reduce franchise rates at any time without the company's consent, the company may increase its rates to the point of reasonableness and adequacy without the agent's consent or the principal's consent.

If the rate provisions are not binding on the Legislature (the principal), they are not really binding on the city (the agent), and so are not really binding upon the opposite party (the company).

The foregoing seem to us axiomatic and elementary principles of contract law, which we should not set forth here if it were not that the respondent's whole brief proceeds in failure to disregard these clear distinctions.

Respondent's Cases do Not Apply to the Facts of this Case.

Respondent's brief does not cite any Federal decision in which mutuality and enforceability has been held to attach to the rate provisions of a franchise grant where, as here:

(1) The State Court has held that the franchise provisions do not and cannot suspend or restrict the exercise of the regulatory power against the company's rates; or where

(2) The State Court has held that the franchise, actually or by implication, contains a provision that the franchise rates may be *reduced* during the franchise term, without the company's consent, but contains no corresponding provision or procedure for *increase*, if such increase becomes imperative.

As was said by Chief Justice White in the *San Antonio* case, if "the regulating power remains wholly uncontrolled," the supposed restriction on the utility company "*becomes nugatory.*"

Classes of Cases Deemed Irrelevant Here.

Three classes of cases are wholly irrelevant to this issue:

(1) Cases such as *Detroit vs. Detroit Citizens St. Ry. Co.* (184 U. S. 368), where the State Court has construed the rate contracts made by the State agency (*e. g.*, the municipality) to be beyond the power of the Legislature, directly or through the same or any other agency (*e. g.*, a commission) to change during the contract term; and

(2) Cases in which one of the parties to a rate contract (*e. g.*, the utility) seeks the consent of the opposite party

(*e. g.*, the Legislature or *one* of its agents, the Commission) to a change in the rate, and the question arises whether such a change can be made over the objection of *another* agent of the Legislature (*e. g.*, the municipality who acted for the State in making the contract in first instance);

(3) Cases in which a public utility company has made a rate contract with third parties (*e. g.*, large consumers), and the State undertakes, under the police power, to regulate and change such contract rates.

Perhaps this whole matter can be clarified by the answer to this question: Under Section 30, could the Florida Legislature itself make a valid contract so as to fix rates for a definite term, say of thirty years? Clearly it could not make a contract fixing rates in any way which precluded its reduction of them, if it saw fit, the following day.

If the Florida Legislature itself cannot by contract fix rates for a definite term, how can a creature of the Legislature do what its principal is forbidden to do?

II.

Rights of the utility company if the contract rates are to be deemed plenarily subject to regulation.

If, however, an implied term of this franchise is that the specified rates are to remain subject to change upward or downward, in the manner permitted by such regulatory procedure as the State has set up, then in Florida it was the right of this Company to fix and promulgate such rates as it deemed necessary, subject to review of their reasonableness by the courts or by any agency which the State may thereupon set up for the purpose.

The Florida Supreme Court also held that the reserved power to regulate rates "merely makes all contract rates subject to regulation notwithstanding the contract" (Opinion on Rehearing; Record, page 45).

The Court, in its principal opinion, said that the Legislature had not "authorized the city or any other governing body to regulate such rates" (Record, page 42). But, if the ordinance rates are subject to regulation, and the power of regulation has not been vested specifically in the municipality or governing body, but is vested, as at common law, in the company itself, then the company has the right to fix rates different from those specified in the ordinance and an injunction by the State Supreme Court compelling it to observe the ordinance rate and restraining it from enforcing the rate prescribed by the company under the power of regulation vested in the company is confiscatory and violates the Constitution of the United States. The decree of the State Court itself becomes thereby violative of the constitutional guaranties against confiscation and for equal protection of the laws.

The South Glens Falls Case.

One of the cases largely relied on by the Florida Court, especially in its opinion on rehearing (Record, pages 37 and 46), is the *South Glens Falls* case (225 N. Y. 216; 121 N. E. Rep. 777). In that case a rate limited by a village franchise contract had admittedly become inadequate. The gas company promulgated and put in effect a higher rate. The village complained to the Commission that the franchise rate should be restored and enforced because of the contract.

In several cases since that time, the New York Court of

Appeals has upheld the right and power of a utility company to advance its rates to a figure in excess of franchise limitations, and to do this merely by promulgating such rate, without any determination or affirmative action by the Commission or any Court.

Town of North Hempstead vs. P. S. Corporation of Long Island, 231 N. Y. 447;

Public Service Commission vs. Pavilian Natural Gas Co., 232 N. Y. 146.

It seems to us clear that the respondent is confronted with this dilemma:

Either the Palatka franchise is void for want of mutuality,

Or that if a *mutual* right of change in the franchise rate is conferred by the contract, the company is entitled to proceed in the manner in which it did, and the State Court should have proceeded to inquire into the *merits* of the company's plea, as held in the *City of Stromsburg* case, *supra*.

III.

Rights of the company if, as the Florida Supreme Court indicated, these franchise rates were fixed in the exercise of governmental powers.

If the 1914 franchise "left the regulating power uncontrolled" and so lacked mutuality and definiteness of period, then its rate provisions could lawfully have been disregarded and exceeded by the utility in the manner adopted.

The same conclusion also follows if these rate provisions are to be deemed inserted in this 1914 contract in pursuance of governmental powers. We have already quoted

some of the phrases of the State Court, pertinent to this phase of the case, especially the statement (Record, page 42) that

“Erecting or establishing or procuring and operating a public utility plant may be a corporate or business function, while *contracting*, in connection with a franchise grant to a public service corporation, for service of a public nature to its inhabitants, may be a government power of a municipality.”

If a contract is made in a governmental capacity, then it partakes of the nature of a regulation; and, if so, it would fall within the proposition stated by this Court in *Southern Iowa Electric Co. vs. Chariton*, (255 U. S. 539), that the power exercised “does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations.”

IV.

In Conclusion.

With all deference to the State of Florida, we submit that every intendment should here be in favor of reversing the action of the State Court and thereby enabling this company to end confiscation and restore a reasonable rate.

If this is not done now by this Court, this company will be left without remedy for confiscation and ruin, because the State of Florida has refrained from erecting any tribunal for the redress of grievances as to electric rates. So backward and remiss a legislative policy should not be encouraged by making it an effective bulwark, from behind which private property may be confiscated without remedy and without penalty.

The policy of the law should encourage just and reasonable rates—neither too high nor too low. Premium should not be put upon the withholding of just treatment by the erection of modern regulatory tribunals.

The continuing reasonableness of rates and their adaptation to changes in the purchasing power of money should be the objective of the law, so far as consonant with the orderly development of the relation of the legislative and judicial power as to private property devoted to public service.

The law should regard the substance and the actuality of the thing done. It is clear that the actual results of the Florida legislation and the State rulings thereon are injustice, confiscation, and oppression.

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